

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 30th day of April, two thousand eight.

PRESENT:

HON. RALPH K. WINTER,
HON. RICHARD C. WESLEY,
HON. DEBRA ANN LIVINGSTON,
Circuit Judges.

QI WEN XIE,
Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,¹
Respondent.

07-3071-ag
NAC

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as the respondent in this case.

1 **FOR PETITIONER:** **G. Victoria Calle, New York, New**
2 **York.**

3
4 **FOR RESPONDENTS:** **Jeffrey S. Bucholtz, Acting**
5 **Assistant Attorney General, Civil**
6 **Division; James E. Grimes, Senior**
7 **Litigation Counsel; Dimitri N.**
8 **Rocha, Attorney, Office of**
9 **Immigration Litigation, U.S.**
10 **Department of Justice, Washington,**
11 **D.C.**

12
13 UPON DUE CONSIDERATION of this petition for review of a
14 Board of Immigration Appeals ("BIA") decision, it is hereby
15 ORDERED, ADJUDGED, AND DECREED that the petition for review
16 is DENIED in part and GRANTED in part.

17 Petitioner Qi Wen Xie, a citizen of the People's
18 Republic of China, seeks review of a June 20, 2007 order of
19 the BIA affirming the November 21, 2005 decision of
20 Immigration Judge ("IJ") Paul A. Defonzo denying Xie's
21 application for asylum, withholding of removal, and relief
22 under the Convention Against Torture ("CAT"). *In re Qi Wen*
23 *Xie*, No. A 79 307 498 (B.I.A. June 20, 2007), *aff'g* No. A 79
24 307 498 (Immig. Ct. N.Y. City, Nov. 21, 2005). We assume
25 the parties' familiarity with the underlying facts and
26 procedural history in this case.

27 When the BIA adopts the decision of the IJ and
28 supplements the IJ's decision, this Court reviews the
29 decision of the IJ as supplemented by the BIA. See *Yan Chen*
30 *v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005). We review

1 the agency's factual findings, including adverse credibility
2 determinations, under the substantial evidence standard,
3 treating them as "conclusive unless any reasonable
4 adjudicator would be compelled to conclude to the contrary."
5 8 U.S.C. § 1252(b)(4)(B); see, e.g., *Zhou Yun Zhang v. INS*,
6 386 F.3d 66, 73 & n.7 (2d Cir. 2004), overruled in part on
7 other grounds by *Shi Liang Lin v. U.S. Dep't of Justice*, 494
8 F.3d 296, 305 (2d Cir. 2007) (en banc). However, we will
9 vacate and remand for new findings if the agency's reasoning
10 or its fact-finding process was sufficiently flawed. *Cao He*
11 *Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 406 (2d Cir.
12 2005). We review *de novo* questions of law and the
13 application of law to undisputed fact. See *Secaida-Rosales*
14 *v. INS*, 331 F.3d 297, 307 (2d Cir. 2003).

15 Xie argues that the IJ's adverse credibility
16 determination was not supported by substantial evidence. We
17 are not persuaded, however, that the record compels a
18 finding contrary to the agency's in this case. Even if Xie
19 was credible, his family-planning claim, which was based
20 solely on his wife's alleged forced sterilization, fails
21 under this Court's ruling in *Shi Liang Lin*, 494 F.3d at 305.
22 See *Gui Yin Liu v. INS*, 508 F.3d 716, 720, 723 (2d Cir.
23 2007). A petitioner whose spouse has been forcibly
24 sterilized may still establish eligibility for relief if he

1 himself demonstrated "other resistance" to China's family-
2 planning policies and either suffered past persecution or
3 has a well-founded fear of future persecution on account of
4 that resistance. See 8 U.S.C. § 1101(a)(42). However, Xie
5 has never argued that he suffered past persecution or feared
6 future persecution on account of any "other resistance" he
7 may have demonstrated. Moreover, the factual record in this
8 case was "adequately developed" with respect to the issue of
9 "other resistance." See *Shu Wen Sun v. BIA*, 510 F.3d 377,
10 381 n.5 (2d Cir. 2007). Accordingly, there is no need to
11 remand his case to the agency for further development of the
12 record on that issue. See *id.*

13 However, remand is required on Xie's religious
14 persecution claim.² The IJ erred in denying that claim
15 based on his finding that Xie was not an "ardent" Catholic
16 because he did not attend church during a forty-day period
17 when he worked in Louisiana. The fact that Xie did not
18 attend church during his stay in Louisiana does not, without
19 more, demonstrate that he does not have a well-founded fear
20 of persecution based on his religion. Cf. *Yose Rizal v.*
21 *Gonzales*, 442 F.3d 84, 90 (2d Cir. 2006) (finding that

²The IJ's adverse credibility determination did not extend to Xie's religious persecution claim. See *Paul v. Gonzales*, 444 F.3d 148, 156-57 (2d Cir. 2006).

1 "[b]oth history and common sense make amply clear that
2 people can identify with a certain religion, notwithstanding
3 their lack of detailed knowledge about the religion's
4 doctrinal tenets, and that those same people can be
5 persecuted for their religious affiliation").

6 Furthermore, the two Department of State reports in the
7 record indicate that Catholics are subject to severe
8 mistreatment in China. Yet, both the IJ and the BIA failed
9 to address this material evidence.³ See *Shou Yung Guo v.*
10 *Gonzales*, 463 F.3d 109, 115 (2d Cir. 2006) (holding that the
11 agency has a duty to examine material evidence submitted in
12 support of an applicant's claim); see also *Yan Chen*, 417
13 F.3d at 272-75 (reversing the IJ's denial of an asylum claim
14 where he ignored the 2002 Department of State report
15 supporting the Chinese respondent's claim of religious
16 persecution). We have held that the agency abuses its
17 discretion when it fails to sufficiently examine an
18 applicant's supporting documents, and it is not apparent
19 that the agency "paid any attention" to them. See *Shou Yung*

³It is possible that the agency concluded that it did not need to address such evidence where it had concluded that Xie lacked any subjective fear of persecution on the basis of his religion. Absent an adverse credibility finding with respect to Xie's testimony concerning his religious practices, however, the agency was required to consider all of the material evidence in the record. See *Paul*, 444 F.3d 148, 156-57.

1 Guo, 463 F.3d at 115. Here, the agency's failure to address
2 "self-evidently material evidence" in the record frustrates
3 our ability to meaningfully review the question of whether
4 the correct legal standard was applied. See *Beskovic v.*
5 *Gonzales*, 467 F.3d 223, 227 (2d Cir. 2006) (finding that
6 "the IJ's explanation . . . was insufficient to permit
7 meaningful review of whether the IJ correctly applied the
8 standards"). Accordingly, we remand so that the agency may
9 further analyze Xie's religious persecution claim.

10 For the foregoing reasons, the petition for review is
11 DENIED in part and GRANTED in part. The BIA's decision is
12 VACATED in part, and the case REMANDED for further
13 proceedings consistent with this order. As we have
14 completed our review, any stay of removal that the Court
15 previously granted in this petition is VACATED, and any
16 pending motion for a stay of removal in this petition is
17 DISMISSED as moot. Any pending request for oral argument in
18 this petition is DENIED in accordance with Federal Rule of
19 Appellate Procedure 34(a)(2), and Second Circuit Local Rule
20 34(b).

21 FOR THE COURT:
22 Catherine O'Hagan Wolfe, Clerk

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24 By: _____